

SENATE BILL REPORT

ESHB 2037

As Passed Senate, March 4, 2022

Title: An act relating to modifying the standard for use of force by peace officers, but only with respect to providing that physical force may be used to the extent necessary, clarifying that deadly force may be used in the face of an immediate threat, clarifying that physical force may be used to protect against a criminal offense when there is probable cause that a person has committed or is committing the offense, authorizing the use of physical force to prevent a person from fleeing a temporary investigative detention, authorizing the use of physical force to take a person into custody when authorized or directed by statute, providing that the standard does not permit violations to the United States Constitution or state Constitution, and defining deadly force, physical force, necessary, and totality of the circumstances.

Brief Description: Modifying the standard for use of force by peace officers.

Sponsors: House Committee on Public Safety (originally sponsored by Representatives Goodman and Sutherland).

Brief History: Passed House: 2/12/22, 87-11.

Committee Activity: Law & Justice: 2/21/22, 2/24/22 [DPA, DNP, w/oRec].

Floor Activity: Passed Senate: 3/4/22, 32-16.

Brief Summary of Bill

- Modifies the standard for the use of physical force by peace officers.
- Defines physical force.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Kuderer, Pedersen and Salomon.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; McCune, Assistant Ranking Member; Honeyford.

Minority Report: That it be referred without recommendation.

Signed by Senator Wagoner.

Staff: Joe McKittrick (786-7287)

Background: In 2021, Washington enacted standards for the use of physical force and deadly force by peace officers. Under these standards, a peace officer may use physical force against another person when necessary to:

- protect against criminal conduct where there is probable cause to make an arrest;
- prevent an escape; or
- protect against an imminent threat of bodily injury to the peace officer, another person, or the person against whom force is being used.

When determining whether to use physical force, an officer must use reasonable care. To that end, the officer must:

- when possible, exhaust all available and appropriate de-escalation tactics prior to using any physical force;
- when using physical force, use the least amount of physical force necessary to overcome resistance under the circumstances, which includes a consideration of the characteristics and conditions of the person for the purposes of determining whether to use force against that person and, if force is necessary, determining the appropriate and least amount of force possible to effect a lawful purpose;
- terminate the use of physical force as soon as the necessity for such force ends;
- when possible, use available and appropriate less lethal alternatives before using deadly force; and
- make less lethal alternatives issued to the officer reasonably available for his or her use.

A peace officer may use deadly force against another person only when necessary to protect against an imminent threat of serious physical injury or death to the officer or another person. In this context, necessary means that, under the totality of the circumstances, a reasonably effective alternative to the use of deadly force does not exist, and that the amount of force used was a reasonable and proportional response to the threat posed to the officer and others.

"Imminent threat of serious physical harm" means that, based on the totality of the circumstance, it is objectively reasonable to believe that a person has the present and apparent ability, opportunity, and intent to immediately cause death or serious bodily injury to the peace officer or another person.

"Totality of the circumstances" means all facts known to the peace officer leading up to and at the time of the use of force and includes the actions of the person against whom the peace officer uses such force, and the actions of the peace officer.

By July 1, 2022, the Attorney General must develop and publish model policies on use of force and de-escalation tactics consistent with the standard. By December 1, 2022, all law enforcement agencies must adopt the model policy or otherwise adopt policies consistent with the standard. Law enforcement agencies may adopt policies or standards with additional requirements for de-escalation and greater restrictions on the use of physical and deadly force. Law enforcement agencies must provide copies of policies and additional information to the Attorney General, including any future modifications.

Summary of Bill: Definitions. "Physical force" is defined as any act reasonably likely to cause physical pain or injury or any other act exerted upon a person's body to compel, control, constrain, or restrain the person's movement. Physical force does not include pat-downs. Incidental touching, verbal commands, or compliant handcuffing where there is no physical pain or injury.

"Deadly force" means intentional application of force through the use of firearms or any other means reasonably likely to cause death or serious physical injury.

"Necessary" means that, under the totality of the circumstances, a reasonably effective alternative to the use of physical force or deadly force does not appear to exist, and the type and amount of physical force or deadly force used is a reasonable and proportional response to effect the legal purpose untended or to protect against the threat posed to the officer or others.

"Totality of the circumstances" means all facts known to the peace officer leading up to, and at the time of, the use of force, and includes the actions of the person against whom the peace officer uses such force, and the actions of the peace officer.

Physical Force. The standard for the use of physical force is modified. A peace officer may use physical force against a person to the extent necessary to:

- protect against a criminal offense when there is probable cause that the person has committed, is committing, or is about to commit the offense;
- effect an arrest;
- prevent an escape;
- prevent a person from fleeing or stop a person who is actively fleeing a lawful temporary investigative detention, provided that the person has been given notice that he or she is being detained and is not free to leave;
- take a person into custody when authorized or directed by statute; or
- protect against an imminent threat of bodily injury to the peace officer, another person, or the person against whom force is being used.

Deadly Force. The standard for the use of deadly force is modified. A peace officer may use deadly force against another person only when necessary to protect against an immediate, rather than imminent, threat of serious physical injury or death to the officer or another person. "Immediate threat of physical injury or death" means that, based on the totality of the circumstances, it is objectively reasonable to believe that a person has the present and apparent ability, opportunity, and intent to immediately cause death or serious bodily injury to the peace officer or another person.

Reasonable Care. A provision is added specifying that the standard does not permit a peace officer to use physical force or deadly force in a manner or under such circumstances that would violate the United States Constitution or state Constitution.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony on Engrossed Substitute House Bill: *The committee recommended a different version of the bill than what was heard.* PRO: This bill is in response to the confusion and concern arising from the broad suit of bills we passed last year to establish strong accountability measures to address police misconduct. Stakeholders have determined that we need to define physical force so there is certainty in the law. With the passage of the those bills last year, officers have found that when they are engaged in investigative detentions, suspects are simply walking away because the officers are not allowed to use physical force to prevent those suspects from fleeing. This bill addresses those concerns by defining and limiting the use of physical force while providing officers with a tool they need to do their jobs.

For police officers, the use of force is a tool of last resort. However, there are times when those officers need to use force. This bill recognizes that fact and provides a clear definition of physical force to which police agencies can train officers. This bill is a commonsense course correction.

This bill gives law enforcement officers clear expectations and the ability to act. It also restores law enforcement authority to detain individuals who have perpetrated a crime.

This bill meets the shared goals of stakeholders for equity and reform while making the standards more feasible and transparent for police officers. This clarity is needed and helpful.

After the laws passed last year, the two largest areas of concern relate to investigative

detentions and a lack of a definition of the term physical force. This bill provides answers to those concerns. While not everyone is happy with this bill, it provides a balance and provides clarity to law enforcement.

The definition of physical force in this bill aligns with what police academies have been teaching for many years.

The two most important issues with the laws passed last year are addressed in this bill; providing a clear and workable definition of physical force and allowing officers to prevent a person from fleeing a lawful detention. It is important to note that the duty of reasonable care is still applicable under this bill.

CON: Police should not have authority to use violence to detain people who are no threat to the officer or the public and who have committed no crime. Ethan Murray was sober but in a mental health crisis when police contacted him in May of 2019. Ethan turned and walked away into a wooded lot. The officers pursued, and in a rapid escalation of events shot and killed him. The officer who shot claimed the pursuit fell within the use of force during an investigative detention. The chain of events began with a small step within a modest scope of authority, but in the context of the use of force, small steps are a matter of life or death. The Legislature should seek to defend the hard-fought policing reforms enacted last year, not seek to reverse them. Please do not pass this bill.

Clarifying laws is a good thing, however, this bill goes beyond clarification and may potentially roll back last year's gains. The use of force in an investigative detention should be limited to only those situations where an individual intentionally flees, it should specify that the use of force applies to criminal investigative detentions and not similar civil interactions.

This bill will harm over-policed communities. It allows officers to use physical force based on reasonable suspicion, which invites officer discretion based on snap judgments. This is a space where racial profiling flourishes. Investigative stops include all traffic stops including for infractions, which has led to tragedies in our communities. This bill is a step backwards from the work the Legislature did last year.

Last year the Legislature passed a bill explicitly limiting when police may use force, and this has served as a model for legislatures around the country. Passage of this bill would undermine the clarity and intentions of last years legislation and authorize the use of force where it has been deemed unconstitutional by the United States Supreme Court. Increasing law enforcement discretion to use force will not minimize the use of force against. It will only invite opportunities for more harm.

When officers respond to calls for service, they often experience a chaotic and rapidly evolving situation, and probable cause can rarely be established in an initial response. An officer must be able to restrain a person when the officer has reasonable and articulable

suspicion the person may have committed a crime. This bill attempts to address these concerns but falls short because it requires officers to wait for a person to flee before allowing the use of force.

This bill expands an officer's ability to use physical force when there is minimal evidence to tie the individual to wrongdoing. Last year's legislation was a response to the many situations where individuals were harmed or killed by officers even when they were not committing a crime. The investigatory stops provision of this bill allows officers to use force on traffic stops including for civil infractions. This is not an adjustment; it is a roll back. This bill would put community members in more harm.

We have seen multiple cases across Washington where there has been a deadly miscommunication between officers and individuals with disabilities because the officer did not recognize the impact of the person's disability. One such incident is the case of John T. Williams, who was an indigenous person with a hearing disability whose alleged failure to stop lead to his killing. People with disabilities may be frightened by police officers and may not respond as they normally would. The language of this bill does not take into consideration people with disabilities or those with language barriers. This bill is a significant shift from the legislation passed last year.

After the legislation passed last year, Washington saw a reduction in police violence in this state. If this bill passes, the Legislature would be effectively green lighting an increase in police violence. In 2021, police killings were down 62 percent in Washington while nationally, they were down only 5 percent. A reduction in police violence was the intention of the legislation passed last year, and early data shows progress towards that goal. This bill would be a roll back of the work done last year and will result in an increase in abuse and discretion without the possibility of recompense.

There is no evidence of a state-wide increase in crime in 2021. This is in part because not all data from 2021 is available, but what we can see from the available data is a typical year with increases and decreases. It is important to not cherry pick the increases and ignore the decreases. Over the past year there has been a decline in fatal shootings and fatal vehicle pursuits. This is not typical variation from year to year. This is the largest decline of this state in two decades and the largest decline in any state last year. This is law enforcement's great accomplishment and is the holy grail of reform. Do not reduce the standard for police use of force.

Persons Testifying: PRO: Representative Roger Goodman, Prime Sponsor; Sharon Swanson, Association of Washington Cities; Chief Brian Smith, Chief, City of Port Angeles Police; Armondo Pavone, Mayor, City of Renton; Jay Arnold, Deputy Mayor, City of Kirkland; James McMahan, WA Assoc Sheriffs & Police Chiefs; Brett Gailey, City of Lake Stevens - Brett Gailey, Mayor.

CON: Jeff DeVere, WACOPS - Washington Council of Police and Sheriffs; Martina

Morris, Next Steps Washington; Jasmine Tolbert, NAACP Vancouver Chapter; Lisa Herbold, Seattle City Council; Eliana Machevsky, The National Police Accountability Project; Darya Farivar, Disability Rights Washington; Enoka Herat, ACLU of Washington; Samuel Martin, Washington for Black Lives.

Persons Signed In To Testify But Not Testifying: PRO: Nancy Backus, City of Auburn; Andrew Rolwes, Downtown Spokane Partnership; Dawn Farina, City of Fife Prosecutor and Police Legal Adviser; Laurie Layne; Michael McKinley; Richard Grunewald; Patti Cole-Tindall, Intrim King County Sheriff.

CON: Austin Field, Seattle Community Police Commission; Kevin Peterson Sr.; Braden Pence, On behalf of Justine Murray; Alexis Dunlap; Rick Williams; Dennis Pang, WA Chapter of the American Academy of Pediatrics; DeRay McKesson, Campaign Zero; Anwar Peace, Revive Center for Returning Citizens; Breean Beggs; Teri Rogers-Kemp, WA Defender Association.